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U.S. Department of Transportation
Office of the Secretary of Transportation

GENERAL COUNSEL

November 17, 2000

Vernon A. Williams, Secretary
Surface Transportation Board
Suite 700
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: Ex Parte No. 582 (Sub-No. 1)

Dear Secretary Williams:

Enclosed herewith are the original and twenty-five copies of the Comments of the United States Department of Transportation in the above-referenced proceeding. There is also a computer diskette of this document, convertible into Word Perfect. I have included as well an additional copy of the Department's comments that I request be date-stamped and returned with the messenger.

Respectfully submitted,

Paul Samuel Smith

Paul Samuel Smith
Senior Trial Attorney

Enclosures

cc: Parties of Record

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Before the
Surface Transportation Board
Washington, D.C.

Major Rail Consolidation Procedures	)	Ex Parte No. 582 (Sub-No. 1)

Comments of the
United States Department of Transportation

I. INTRODUCTION

The United States Department of Transportation ("Department" or "DOT") commends the Surface Transportation Board ("STB" or "Board") on the proposed rules under which major railroad consolidations would be considered. Notice of Proposed Rulemaking, served October 3, 2000 ("NPRM"). DOT supported the Board's initiative in considering this vital issue and believes that the proposed rules address most of the key issues in a constructive manner. Although the proposals contained in the NPRM differ in certain respects from what DOT proposed, for the most part these differences are technical in nature.

The Department does have two general recommendations for the Board's consideration in developing the final rules. The first is for greater specificity, which benefits all parties. Knowing in advance what will be required by the Board when it reviews a merger application allows prospective applicants to better gauge their chances of success and to avoid transactions that are doomed from the start. Similarly, more specificity enables shippers, communities, and other parties to more realistically pursue conditions or negotiate agreements with applicants.

A clear set of standards will also affect the STB's effort to encourage applicants to structure transactions in a way that achieves public benefits sooner rather than later. This very worthy goal is compromised by vagueness, insofar as

securing public benefits on an accelerated basis may well require changes and investments in advance of formal approval, but uncertainty about that approval acts as a disincentive to undertake such steps. Finally, uncertainty should be minimized through ever-clearer standards because a failed merger of the size in prospect can pose serious problems not just for applicants, but for the larger economy, particularly if transactions have been structured and investments made in anticipation of approval.

The Department notes with approval the significant shift in emphasis embodied in the proposed rules. Previously, mergers were permitted where they demonstrated that, properly conditioned, they caused no harm to competition, the environment, etc. Under the proposed rules, however, the bar has been raised so that mergers would need to pass the stricter test of demonstrably providing positive public benefits. This is as it should be for those consolidations that pose greater uncertainties and risks. *See, e.g.*, DOT Comments at 1-3. However, not every possible combination of existing or prospective Class I railroads will necessarily introduce the same qualitative and quantitative risks that a transcontinental merger of domestic or international carriers would. DOT thus urges the Board to consider that there may be instances in which the height of the "bar" could be adjusted without harm to the public interest.

COMMENTS ON SPECIFIC SECTIONS

Competition

As stated in its response to the Board's Advance Notice of Proposed Rulemaking, served March 31, 2000 ("ANPRM"), the Department supports the proposition that, to gain approval, the Board must require that public benefits flowing from a proposed merger exceed the standard applied in the past. The STB's proposed merger rules appear to endorse that position. The Board has emphasized in the NPRM that its proposed rules would represent a paradigm

shift in the way it reviews mergers. It has determined that its past support for industry restructuring -- reflected in a "decidedly pro-merger" policy -- is no longer of paramount concern, and that henceforth it will place much greater emphasis on steps that will not only preserve but also enhance competition, to increase a transaction's public benefits. NPRM at 9-13. To that end, applicants would be required as part of their merger application to propose and explain conditions that would enhance competition.

The Board's reasoning for requiring such conditions is basically twofold. First, service disruptions encountered in the implementation of recent mergers have, at least temporarily, negated or delayed many of the merger benefits promised by the applicants. Second, the Board expects that future mergers are likely to result in anticompetitive effects, such as loss of geographic competition, "that are increasingly difficult to remedy directly or proportionately." Id. at 12. In the Board's view, the applicants are in the best position to determine how other - not directly related - competition enhancements could provide offsetting public benefits to compensate for such losses.

The Department supports the STB's proposal to require applicants to submit proposed conditions to enhance competition, particularly where there may be anti-competitive effects that are otherwise difficult to remedy. In our response to the ANPRM, DOT supported enhancing competition through mandated open access at terminals as a way to mitigate the loss of geographic competition. DOT Comments at 13-14. Additionally, DOT believes that conditions that enhance competition, if applied ju iously, will help to ensure the national rail system's sustainability. [1]

However, the NPRM offers little guidance as to what types of proposals

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[1]/ The Board's explanation of its proposed "General Policy Statement" states that any merger will affect not only applicants but the entire transportation system, and that the STB "must be confident that at the end of the day a balanced and sustainable rail transportation system is in place." NPRM at 11.

would meet the Board's requirements, and how extensive such measures would have to be. We appreciate that the STB wants to encourage applicants to fashion innovative means to enhance competition; nevertheless, we believe that concrete examples and additional guidance should be offered to indicate the types of arrangements that should be pursued. One such direction could indicate that geographic competition would be enhanced by adopting open switching practices in terminal areas, as previously proposed by DOT. DOT Comments at 14-15.

We note also that the Board seems to assume, *a priori*, that there will be competitive problems arising from a merger that cannot be directly remedied. Although DOT does not discount that possibility, we believe it is premature to conclude that it will occur in all cases. We urge that the Board mandate, where such situations do present themselves, that the record must first demonstrate that there is no feasible way of remedying the problem directly. The shipper suffering the competitive loss may not be able to benefit from the expanded market access measures provided to balance it. Offering greater competitive options to shippers generally has merit, but there should be a recognition of the need to first attempt to match awards of additional competitive options to the specific shippers on whom the transaction otherwise would impose losses of such options.

The Department believes that enhancing competition does not always produce unalloyed public benefits in an industry such as the rail industry, which is characterized by decreasing costs and requires differential pricing to recover full costs. The Board must be certain in its evaluation that competitive

enhancements do not result in long-run public disbenefits.[2] Additionally, if competitive enhancements are required to balance potential service implementation problems, the STB must ensure that enhancements do not inadvertently exacerbate merger implementation difficulties through increased congestion.

Although the STB has indicated that it will generally rely on applicants to develop innovative conditions that enhance competition, it has stipulated three types of enhancements that would apply automatically in every merger. At a minimum, the Board would require that applicants explain how they would preserve the use of major gateways, the potential for build-outs or build-ins, and the "opportunity" to enter into contracts for one segment of a move as a means to get the right to pursue rate relief for the remainder ("bottleneck") portion of the movement.

Previously DOT urged the Board to require major Midwest gateways and major routes to be kept open, both physically and economically. DOT Comments at 15-16. Additionally, we pointed out that if the rule applied only to the merging railroads, they would be put at a competitive disadvantage compared to other competing railroads serving the gateway. We urged the Board to require all carriers serving the affected gateways to be covered under the order -- such a condition would preserve, and perhaps enhance, effective gateway competition. Absent such a condition, competition may actually be reduced. We urge the Board to clarify its position on this issue, as the NPRM is silent on the matter.

The NPRM's proposed requirement with respect to "bottleneck routings" appears to be analogous to its proposal for gateways. That is, by requiring that

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[2]/ In comments responding to the Board's ANPRM, the Department introduced a recent econometric analysis of rail cost conditions that found enhancing competition may increase the resource costs borne by society for rail services. The study's finding, of course, is not dispositive and is open to challenge. However, it does reinforce the Department's recommendation that the Board exercise care in imposing competitive enhancements.

the opportunity to obtain contracts for a routing segment be preserved, the NPRM would appear to require applicants to maintain routings that would allow captive shippers to pursue a joint-line movement with a second carrier. This appears to be a change from the ANPRM, in which the Board seemed to be considering requiring applicants to offer contracts for their portion of the bottleneck route, to allow the shipper to obtain a rate from the connecting carrier for the other segment. ANPRM at 8. In response, DOT had maintained that it would be illegal for the Board to compel such contracts. DOT Comments at 16. Instead, we urged that the STB offer a streamlined process to allow captive shippers with contracts from non-applicant carriers to obtain an immediate rate from applicants for their segment of the bottleneck. That streamlining is equally applicable under the requirement contained in the NPRM. We urge the Board to clarify whether it intends to waive its existing two-step procedure, which is beyond the province of applicants to modify on their own. [3]

The Board's efforts to address bottlenecks and enhanced access in this proceeding will help shippers affected by individual transactions. Unfortunately, other shippers will not benefit, and if there are no other major mergers, no access or bottleneck relief for any shippers will be forthcoming. It is thus clear that these questions exist independently of consolidations. DOT therefore continues to hold the view that the access question should be the subject of a separate, industry-wide, rulemaking. As indicated in our ANPRM comments, the railroads' requirements for differential pricing can be consistent with efficient access pricing for bottlenecks. DOT Comments at 16. Economists have laid out a basic methodology for doing so; one that would assure a more efficient carrier direct access to the shipper on the one hand, and prevent the

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[3]/ The current process requires a proceeding first to establish that a shipper is entitled to access by a second railroad, and second to challenge the reasonableness of the rate.

shifting of traffic to a less efficient competitor, on the other.[4] We urge the STB to explore this further.

Service Issues

On service issues, the Board and the Department start from the same premise. "Experience shows that significant service problems can arise...even after applicants take extraordinary steps to avoid such disruptions." NPRM at 15; proposed sec. 1180.1(c)(2)(iii). The Department concurs with the Board and other commentators that any new merger rules should require evidence that the applicants have taken appropriate initiatives to protect the public from post-merger service disruptions. In broad terms, the Board's focus in the NPRM on the avoidance of transitional service problems reflects the objectives of the Department's comments. *See* DOT Comments at 5-12; DOT Reply Comments at 3.

There is considerable overlap between the Board's proposed rules and the Department's comments in areas such as requiring applicants to submit detailed plans for transitional service performance, post-merger oversight and monitoring by the Board, advance contingency planning, establishment of service councils, and attention to the critical role of employee training and staffing. Id. The Department supports the Board's proposals in these areas and urges the Board to carry these new requirements through to the final rule.

At the same time, the Department is concerned that there may be a difference in approach and emphasis regarding negotiated service "guarantees" (the Department's recommendation) and negotiated service "assurances" (the Board's terminology). In addition, there are several areas where the Department has questions regarding interpretation of the proposed rules.

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[4]/ *See, e.g.*, Beshers, Eric, *Efficient Access Pricing for Rail Bottlenecks* (Study commissioned by the FRA), Hagler Bailly Services, Inc., June 2000. The study is available to all interested parties on FRA's web site, the URL for which is www.fra.dot.gov.

Service Guarantees and Service Assurances

The Department is unsure whether the Board's term "service assurance" and the term "service guarantee" as used by the Department and other commentators are synonymous.[5]

In its narrative discussion of the proposed rule, the Board states that shippers and Class II and III railroads indicated a need for "more specific service assurances." NPRM at 20. The Board goes on to state that applicants could provide such assurances, and in addition declared that "we expect applicants to engage in good faith negotiations with shippers and connecting carriers." Id. The Board further indicates that the "extent to which applicants are successful in such negotiations would be an important consideration in our determination as part of the balancing process of the likelihood of merger-related service harm and the possible need for mitigation." Id.

The Board's discussion raises several questions. Are negotiated service assurances and service guarantees equivalent terms? Why are negotiated service assurances mentioned in the narrative discussion, but not mentioned in the rule itself? Would the Board's negotiated service assurances indemnify shippers (or penalize carriers for poor performance) in any way? Why does the Board view service assurances as a consideration in the balance between "the likelihood of merger-related service harm and the possible need for mitigation" rather than an

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[5]/ Different parties in this proceeding have used different terms to describe the types of relief which they believe should be forthcoming in the event of merger implementation problems. The Committee to Improve American Coal Transportation, for example, urged the Board to require "service assurances" that include damage recoveries, financial penalties, access to other carriers, and the right to override paper barriers. Others proposed "service guarantees" characterized by varying terms and conditions. Some commentators thought that such provisions should be required; others that they should be at applicants' option. The Board should therefore clarify both what it means by specific "service assurances" (since there is a wide range of possible meanings), and whether they are required as part of major applications or not.

issue for the approval process itself? What type of mitigation is the Board considering to compensate shippers in lieu of service guarantees?

In its prior comments the Department characterized service guarantees as private "contractual agreements that would guarantee minimum levels of service during the post-merger transition period." DOT Comments at 9. The specific details would be negotiated between applicants and shippers, connecting small railroads, as well as Amtrak and commuter railroads that operate over the applicants' systems. In the event of a service failure associated with the implementation of the merger, "the shipper would be entitled to compensation, which could be in the form of access to alternative transportation service, rate discounts, or recovery of losses." Id.

The Department recommended that the Board encourage applicants to offer service guarantees as a practical and self-executing mechanism to ensure that shippers and small railroads would not be penalized as a result of transitional service problems, and to ensure that the applicants will make realistic commitments to which they will be held. We continue to urge the STB to define "service assurances" in its final rule as analogous to the "service guarantees" described in our initial comments. DOT Comments at 9-10, 20. In addition, the Board should explain that any service assurances or guarantees should provide some form of compensation (to be determined by the parties) if applicants fail to maintain the promised minimum level of service. DOT also urges the Board to place significant weight on evidence of the applicants' willingness to offer service guarantees in judging the merits of an application.

In summary, the Department again urges the Board to unequivocally place the onus on the applicants to make good on promised service levels, and to provide shippers, small railroads, Amtrak, and commuter authorities a self-executing mechanism for obtaining relief and/or compensation.

Dispute Resolution

In order to address disputes over service integration problems, the Board proposes to "require applicants to establish problem resolution teams, and specific procedures for problem resolution to ensure that post-merger service problems, related claims issues, and other matters are promptly addressed." NPRM at 19; proposed sec. 1180.1(h)(3). Under this proposal, the Board also would "envision" the establishment of a service council that would include shippers and other interested parties. Id.

The Department supports the establishment of service councils and, in fact, recommends that they be required. We do not clearly understand what the Board means by the term "problem resolution teams." We assume that these are designated railroad staff employees who will work with shippers and other railroads to resolve service problems, but DOT urges the Board to clarify this term.

In addition to the private sector problem resolution teams and service councils described in the proposed rule, the narrative discussion following proposed sec. 1180.1(h) also notes the Board's intention "to continue its own informal process for handling complaints." NPRM at 20.

Service councils and internal railroad teams and procedures, as well as the Board's informal complaint handling procedures, have been utilized in past mergers to address post-merger service issues and have proved useful. However, it is the Department's view that just as the history of service disruptions warrants new rules to avoid future service failures, so too the history of contentious disputes over service problems warrants a fresh approach and a neutral forum for expedited arbitration.

The Department recommends that the Board make available the informal arbitration provided by the Part 1108 of the Board's existing rules to resolve post-merger service-related claims or disputes. This alternative dispute mechanism was developed by railroads (including smaller railroads) and shippers through

the Railroad-Shipper Transportation Advisory Council established by the ICC Termination Act ("ICCTA").[6] This informal arbitration process could be readily adapted to merger-related service disputes, especially disputes that may grow out of the negotiated service guarantees or negotiated service assurances described above.[7] This alternative dispute resolution mechanism is a product of consensual rulemaking. Although we understand that the arbitration has not been used extensively (if at all) since the rule was adopted in 1997, the Department believes that with the Board's encouragement, such a forum could prove extremely useful in resolving post-merger disputes.

Additional DOT Service Issues

There were several other suggestions discussed in the Department's comments that could help avoid service disruptions and service disputes in the first place, but which do not appear in the NPRM. Specifically, we urge the Board to incorporate the following proposals in its final rule.

Staged Implementation

The Board did not directly address the Department's recommendation for a staged or sequential step-by-step integration process for large, complex transactions. DOT Comments at 10-11. As explained, staged implementation would result in a controlled step-by-step integration process.

The Board as part of its proposed Service Assurance Plan would require applicants to submit a "time line" for "all major functional or system

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[6]/ ICCTA established the Railroad-Shipper Advisory Council. However, the arbitrtation procedure recommended by the Council and adopted by the Board in 49 C.F.R. Part 1108 apparently has never been used. *See* Ex Parte No. 560, decision served September 2, 1997.

[7]/ The Board's Decision in Ex Parte No. 560 clarified that the adopted arbitration procedures would be available for post-merger disputes. *See* Id. at 3.

changes/consolidations." NPRM at 37; proposed sec. 1180.10(j). With the time line the Board would have the tools and information necessary to make approval contingent on a staged implementation. However, it is not clear whether it is the Board's intent to utilize this information as a way to require a staged implementation for large, complex mergers.

Benchmarks

The Board in its "Service Assurance Plan" requires applicants to provide benchmarks for the year immediately preceding the filing date. NPRM at 36; proposed sec. 1180.10(a). Although similar to a requirement suggested by the Department, DOT reiterates its strong recommendation that the benchmarks include shipper-oriented performance measures such as "cycle times, origin-destination transit times, or percentage of on-time shipments." DOT Comments at 7.

Review of Prior Merger Service Records

The Department would also like to emphasize its prior comment that the Board should consider the prior record of applicants in providing post-merger service. *See* DOT Comments at 12. As the STB states, the new rules would require it to balance public benefits against potential harm. The Department believes an applicant's prior record (for better or worse) is relevant and appropriate to the balancing process.

Labor

The Department commends the Board for recognizing in its proposed rules that a properly staffed and well-trained workforce will be critical to the success of any future rail consolidations. We note that the STB proposes to revise sec. 1180.1(m), "Public Participation," to specifically reference rail labor. In addition, the Board proposes to require applicants under sec. 1180.10, "Service Assurance Plans," to address employee training and staffing in detail as critical

components of the Service Assurance Plans that the Board will evaluate. Proposed sec. 1180.10. The Department fully supports these new initiatives.

Implementing Agreements

Proposed sec. 1180.10(e), "Labor Protection," states: "[t]he Board supports early notice and consultation between management and the various unions, leading to negotiated implementing agreements." In addition, under proposed sec. 1180.10(g), applicants would be required to submit a plan for "reaching necessary labor implementing agreements."

The Department in its initial comments urged pre-merger completion of implementing agreements. DOT Comments at 27. However, it appears that the Board has stopped short of this goal. In our reading of the proposed rules, it is not clear what would be expected in the plan for reaching implementing agreements (*i.e.*, would it be merely a time line, or would the plan indicate the substance of what the applicants intended to offer in order to reach implementing agreements). In addition, it is not apparent how such a plan would assist the Board in judging either the merits of the merger or the potential for service problems. Therefore, the Department repeats its recommendation that the early completion of implementing agreements should be required.

Relocation and Test Period Earnings

Previously, the Department recommended that the Board revise the employee relocation rules and compel carriers to grant employees access to test period earnings records. Id. The Board directed the parties to negotiate over these issues to obviate the need for regulation; and the Board further directed the parties to report back on the progress of negotiations. NPRM at 17. We agree with the negotiation-first approach advocated by the Board. However, we wish to re-emphasize our position that, in the absence of a negotiated resolution, the issues merit inclusion in the revised merger rules.

Cross Border Job Changes

The Department concurs with the Board's proposal in sec. 1180.6(b)(9), "Employee Impact Exhibit," that "any major transnational merger ... will ... require knowledge, on our part, of the effects of the proposed transaction upon all applicant carriers' employees, regardless of whether they are located in Canada, Mexico, or elsewhere." NPRM at 31.

Cram Down

The Department has previously indicated its position on cram down, which is that all collective bargaining should be conducted under the auspices of the National Mediation Board and should adhere to the procedures of the Railway Labor Act. DOT Comments at 26. Mindful of the Board's interpretation of its underlying statutory authority on this subject, however, we addressed cram down in our initial comments within the context of administrative changes that the Board unquestionably has the authority to make as part of its updating of the merger rules.

While the Department continues to adhere to its position, we believe that the Board has taken a major step in the right direction by stating that it "will look with extreme disfavor on overrides of collective bargaining agreements except to the very limited extent necessary to carry out an approved transaction." NPRM at 17; proposed sec. 1180.1(e). This is consistent with our recommendation that the STB address the long-debated application of its "necessity" standard and limit cram down to "situations that would not arise except for the immediate merger transaction." DOT Comments at 25.

As the Transportation Communications International Union ("TCU") [8] has pointed out, there is a distinction between contracts that might burden a

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[8]/ "TCU" as used herein refers to the joint reply comments of the Transportation Communications International Union, International Brotherhood of Electrical Workers, American Train Dispatchers Association Department-BLE, and International Association of Machinists.

transaction and those that present a clear obstacle to the transaction. TCU Reply Comments at 4. The Department encourages the Board to reinforce its proposal to restrict cram down by explicitly addressing the threshold for necessary changes and to bring the standard in line with the City of Palestine distinction advocated by the TCU. City of Palestine v. United States, 559 F.2d 408, 414-15 (5th Cir. 1977).

The Department notes that although the Board proposes a significant change in the administration of its labor protection responsibilities, there is no guidance or elaboration regarding this change in the NPRM's narrative discussion. DOT recommends that the STB make clear that the threshold circumstances under which it will permit cram down have been narrowed significantly. This would also help to minimize any possible misinterpretation or ambiguity. Otherwise there is the danger that the disagreement surrounding cram down will continue to fester and cast a cloud of uncertainty over a wide range of merger-related system coordinations. The dispute over cram down has been going on since at least 1983. The Board now has the unique opportunity to end this longstanding controversy for the good of the industry, before any new merger applications are submitted. The Department recommends that the Board make clear in both the rule and narrative that the necessity standard will restrict cram down to very limited circumstances, where conflicting collective bargaining agreements at overlapping or common points can be shown to constitute an actual obstacle to the implementation of the merger. In addition, DOT urges the STB to further limit the scope of circumstances when cram down can be invoked to the immediate transaction under consideration.

Negotiations on Cram Down

The Board's discussion of the revised rule on cram down describes the successful negotiations between the UTU and some of the major carriers and the Board's preference for negotiation.[9] NPRM at 17. However, several non-operating unions pointed out in their initial comments that cram down affects different crafts differently. *See* TCU Comments at 4. Employee groups that have experienced the greatest job losses in recent mergers cannot be expected to be able to negotiate from the same position of strength as employee groups that have seen actual increases in employment following a merger. As the Department understands the situation, even the UTU has not been able to reach agreement with all Class I carriers.

The Board should not delay or equivocate on an issue so critical to employee rights as the circumstances under which collective bargaining agreements can be extinguished, in the hope that the parties will find an equitable resolution. The Department urges the Board to ensure that all employee groups are equally protected from the potential negative impacts of a consolidation. This can be done by making clear through both the plain language of the rule and elaboration in the narrative discussion as to how the strict restriction in the rule (which states "to the very limited extent necessary") will be applied by the Board in a typical merger scenario.

In summary, the Department believes the proposed rule to administratively limit cram down does not go far enough. The STB should find

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[9]/ The discussion in the NPRM implies that the UTU has reached agreement with all the Class I railroads covering merger implementation issues. Only the carriers that are members of the National Railroad Labor Council ("NRLC") have an agreement with the UTU. It is the Department's understanding that not all the major U.S. railroads belong to the NRLC, and neither do the Canadian railroads. This could present a problem in future consolidations. For example, when a combination between BNSF and CN was in prospect, it was significant that the BNSF has an agreement with the UTU, but the neither the CN nor its U.S. subsidiaries have an agreement.

that cram down authority is no longer necessary. Failing that, we urge the Board to reinforce its commitment to protecting employee rights by explicitly incorporating the City of Palestine definition of "necessity" in the final rule, as discussed by TCU.

Public Interest Considerations

The proposed rules state that "[t]o maintain a balance in favor of the public interest, merger applications must include provisions for enhanced competition." NPRM at 12. The rules go on to note that unless proposals are so framed the Board will use its broad powers to condition its approval to "preserve and enhance competition." Id. DOT fully supports carefully evaluating a merger and assuring that, after considering the risks and any negative impacts, it does not harm the public interest. We likewise remain of the view that major consolidations should offer enhanced public benefits to offset their increased risks. However, we believe the NPRM does not provide clear enough guidance as to the standards the Board would use to determine the "net" amount of public benefit and/or enhanced competition that would be required.

Potential Benefits and Harms

The Department believes that valuing the public benefits of future major mergers will be difficult. Perhaps the Board might consider identifying specific categories of public benefits that it expects to be addressed in an application, and providing some indication of the level of benefits expected. For example, the larger the scale of the merger, and the greater degree of risk that it presents, the greater the benefit level would have to be. DOT notes that public benefits could include the traditional benefits of greater efficiency, better service, lower rates and single line service, as well the enhanced competition cited by the STB. Other areas of possible public benefit might include providing greater access for commuter operators on certain lines, environmental improvements such as funding grade separation or whistle-ban corridors and rerouting trains to reduce

environmental harm. In short, there are a number of areas of potential benefits that might be considered, but applicants need more information regarding the level of benefits expected.

Smaller Carriers

DOT agrees with the STB that "mergers should strengthen , not undermine, the ability of the rail network to advance the nation's economic growth and competitiveness, both domestically and internationally." NPRM at 15. Recent merger transition problems have seriously harmed smaller railroads, many of which cannot financially endure the disruptions that have resulted. Merging carriers should be required to demonstrate the effects that their consolidation will have on smaller railroads, and they should address how they would work in partnership with their Class II and III connections to mitigate adverse impacts, particularly during implementation.

Notwithstanding the most careful planning, the financial hardships that may be imposed on small railroads if service problems nonetheless occur could be devastating. For the reasons noted earlier, the Board should define negotiated "service assurances" in the final rule so that the phrase covers the concept of the "service guarantees" described in the Department's initial comments. In addition, the Board should explain that any service assurances or guarantees should provide some form of compensation (to be determined by the parties), if applicants fail to maintain the promised minimum level of service. The Department also urges the STB to place a much greater weight on evidence of the applicants' willingness to offer service guarantees to shippers, connecting short lines, Amtrak and commuter authorities in judging the merits of the application itself.

The STB's proposed rule suggests that merging carriers should consider eliminating so-called "steel and paper barriers" in fulfilling the proposed requirement to enhance competition, but the Board is silent on the need to

consider this approach in addressing transitional problems. DOT continues to support relief from steel and paper barriers when necessary to help resolve congestion problems during transition difficulties.

Passenger Services

Passenger rail services, both Amtrak and commuter rail, are becoming increasingly important to the national transportation system, and the Board is correct in requiring applicants to conduct "full system" impact analyses demonstrating, among other things, impacts on passenger and commuter service. NPRM at 34-35. Requiring applicants to coordinate passenger and freight operations and to explain how they expect to do so, including commitments to fulfill existing performance agreements with passenger operators, is a positive step. DOT reiterates its support for developing transition service plans in cooperation with the passenger railroads. The STB should also encourage applicants to offer service guarantees for passenger railroads, similar to those discussed above for Class II and III carriers.

Environment and Safety

DOT continues to support the STB's proposal to continue the existing Safety Implementation Plan procedures in a case-by-case approach. DOT and the FRA will continue to work with applicants in any merger proceeding to prepare and monitor safety implementation plans in order to assure that safety is not compromised. We also commend the Board for clarifying that cross-border safety issues need to be addressed in international mergers.

The Department is pleased as well that the STB has addressed environmental concerns in this proceeding. NPRM at 17-18, 34. The STB's environmental process has worked well in recent major mergers, but the scale of those mergers and growing pressures on railroad capacity have led to unforeseen impacts. In particular, we applaud the Board for requiring applicants to address the blocked grade crossing issue. To aid in accomplishing this, DOT

recommends that the STB require applicants to provide up-to-date data to the DOT/AAR Highway-Rail Grade Crossing Inventory for all crossings in the merged system. [10] These data would provide a source of reliable "baseline" information on which the Board and others could easily rely in order to accurately gauge the effects of a merger on grade crossing access. Ideally, the data should be updated periodically, perhaps every five years, to judge the long-term effects of the consolidation on blocked crossings.

Although DOT acknowledges that encouraging applicants to negotiate with communities over environmental mitigation is both logical and effective, the proposed rules could be clearer in terms of the rights and responsibilities of the communities, particularly smaller communities.

Oversight

The Department continues to support effective oversight procedures, as proposed in the NPRM. Id. at 19.

Cumulative Impacts and Crossover Effects

DOT shares the Board's concerns regarding the potential "downstream" impacts of mergers among the remaining major Class I carriers. However, we wish to emphasize that not only are the applicants' efforts to divine the future implications of their transaction subject to review and rebuttal by interested parties (like the rest of any application package), but that all such attempts are by

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[10]/ The DOT/AAR Highway Rail Grade Crossing Inventory contains pertinent safety data and information concerning average daily levels of both highway traffic and rail traffic for every grade crossing in the country. An accurate inventory requires data from both the states and the railroads. These data are provided voluntarily; unfortunately, some states and some railroads have not updated their crossing inventory data for many years (in some cases more than a decade). Accurate, up-to-date data will ensure that the Inventory is a reliable, readily available tool for the Board and communities to utilize to identify and monitor concerns regarding blocked crossings.

definition predictive. Thus the Board must be very careful in deciding cases or adopting conditions based upon even the most persuasive version of future events. Again, to the extent possible, the STB should set forth more specifically what is required of applicants and how it will consider the evidence submitted.

Transnational Issues

Following expressions of concern from this Department, the U.S. Department of Agriculture, and others, the Board in its ANPRM sought comment on whether and how to address issues that arise when foreign-based railroads combine with U.S. carriers. ANPRM at 6-7. DOT responded generally that such transactions pose their own uncertainties, owing to the prospect that foreign law or policy may significantly affect an applicant's ownership, structure, or operations. DOT Comments at 31-34. These concepts simply do not apply to consolidations involving only U.S.-based railroads. We submitted that the best way to address these potential issues was to conduct a "searching inquiry" in order to create a record on which the Board could decide the appropriate course of action. Id. at 32.[11] The Board's proposals in this regard are directly responsive to the concerns expressed by DOT and others, and the Department strongly supports them.

As a threshold matter, the Department considered that the proper inquiry should include information about all of the effects of a transaction under study, and not just those that the applicants might deem relevant to the U.S. Id.; DOT Reply Comments at 10. The STB has proposed that information covering applicants' "full system" in the U.S. and elsewhere would have to be submitted. NPRM at 21-22, 34-35; proposed sec. 1180.1(k). This furthers the creation of a record detailing a transaction's complete impact in this country, and DOT

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[11]/ DOT stressed that the Board should not "run afoul of" whatever existing legal regimes might be in place to address these issues, but only acquire the information necessary to sound decisionmaking. DOT Reply Comments at 10-11.

endorses it.

More specifically, DOT noted that the meager experience gained thus far with these international combinations suggested at least three main areas of exploration: safety, national favoritism, and corporate control. DOT Comments at 32-34. Safety concerns arise because of the possibility of questions about the reach of FRA regulations and the realities of enforcement across international boundaries. National favoritism involves concerns that commercial decisions would be based upon national rather than economic considerations. Corporate control refers to foreign legal or regulatory strictures on the form or citizenship of carrier owners, corporate officers, and to other ownership or operational limits or requirements that do not apply to U.S. railroads. Id. DOT also agreed with other parties that the STB should consult with agencies of other governments that exert authority over some or all of these transactions. DOT Reply Comments at 11.

Again the Board has promulgated appropriate proposals. With respect to safety, applicants would have to discuss continued cooperation with FRA. Id. [12] Many important railroad functions that profoundly affect the safety of railroad operations in the U.S. could be transferred outside the country (*e.g.*, train dispatching, locomotive maintenance, etc.). The transfer of safety-critical work and functions could negatively affect the safety of U.S. rail operations that are part of a transnational system and could impair FRA's ability to monitor and oversee the safety of those rail operations.

Many countries do not have the stringent railroad safety laws and regulations that exist in the U.S. For example, random drug testing of safety-sensitive railroad employees is required by law in the U.S. but not in Canada. Even in countries where similar rail safety regulations are in place, there may not

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[12]/ This provision would not, of course, amount to an extension of FRA's legal authority. It would simply provide the information and exchange of views important to the sound exercise of FRA's existing authority.

be regulatory agencies with the authority, expertise, resources, or mandate to enforce such regulations on activities that affect railroad safety and operations outside of their own borders. There may also be questions of legal jurisdiction and authority as to whether a regulatory body in another country could successfully enforce either its own safety regulations or U.S. safety regulations to control railroad activities which take place in that country but only impact the safety of railroad operations in the U.S.

Applicants would also need to address the "likelihood" of decisionmaking based upon non-commercial considerations and detrimental to the U.S., as well as foreign ownership or operational restrictions and their effect on the public interest. Id. Finally, the Board has proposed to "consult" with appropriate officials about relevant international obligations and to "cooperate" with Mexican and Canadian agencies with authority over a transaction before the STB. Id.

These proposals advance the core interest of reducing the special uncertainties that major transnational rail consolidations introduce. They do so largely by providing information and subjecting it to scrutiny – the proven, traditional method of administrative record-making. [13]

National Defense

The Department also submitted that the singular issues raised by the possible application of foreign law and policy could raise national defense concerns should a major portion of the country's rail infrastructure be owned by a foreign carrier. DOT Comments at 35. The Department of Defense ("DOD"),

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[13]/ The Department offers only one clarification. It is the prospect of foreign law and policy different from that in the U.S. that drives this portion of the proceeding in the first place. We therefore suggest that the Board may wish to expressly acknowledge that its "cooperation" with foreign agencies in no way would compromise its independent assessment of the public interest in a pending transaction.

through the Military Traffic Management Command, urged that no merger should degrade a carrier's "ability and willingness to contribute to defense objectives and readiness," and offered specific factors to be considered in assessing this aspect of a transaction. DOD Comments at 8-9.

The Board has proposed to require applicants to "assess and address the national defense ramifications" of their transactions, and has served notice that it will refuse to permit any consolidation to "detract" from the military's ability to rely on the national rail infrastructure. NPRM at 48; proposed sec. 1180.1(l). DOT anticipates that DOD will discuss this issue, and we therefore simply repeat our prior request for the STB to be "attentive" to those comments.

Conclusion

The Department commends the Board on the proposed rules. Careful refinement of these proposals along the lines suggested should result in final rules that assure future major rail mergers do not harm the public interest and facilitate an efficient national rail system.

Respectfully submitted,

ROSALIND A. KNAPP
Acting General Counsel

November 17, 2000

CERTIFICATE OF SERVICE

I hereby certify that I have on this day caused to be served on all Parties of Record by first-class mail, postage prepaid, a copy of the foregoing Comments of the United States Department of Transportation filed in Ex Parte No. 582 (Sub-No. 1).

Paul Samuel Smith

November 17, 2000